IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 3507 OF 2004

Sharan P. Khanna ... Applicant

versus

1. The State of Maharashtra,
2. M/s. JEM Fiscal Ltd.,
   through the Director Mr.
   Nazir Hakeem. ... Respondents

...

Mr. Ramrao Adik, Senior Counsel, with Mr. Peter Lobo, for the Applicant.

Mrs. A.S.Pai, A.P.P., for Respondent No. 1.

Mr. A.P.H. Ponda, for the Complainant.

...

WITH

CRIMINAL APPLICATION NO. 3508 OF 2004

Mrs. Bharati S. Khanna ... Applicant

versus

1. The State of Maharashtra,
2. M/s. JEM Fiscal Ltd.,
   through the Director Mr.
   Nazir Hakeem. ... Respondents

...

Mr. Peter Lobo for the Applicant.

Mrs.A.S. Pai, A.P.P., for Respondent No. 1.

Mr. A.P.H. Ponda, for the Complainant.

...

WITH

CRIMINAL APPLICATION NO. 3509 OF 2004

Tapin S. Khanna ... Applicant

versus

1. The State of Maharashtra,
2. M/s. JEM Fiscal Ltd.,
   through the Director Mr.
   Nazir Hakeem. ... Respondents

...

Mr. Peter Lobo for the Applicant.

Mrs.A.S. Pai, A.P.P., for Respondent No. 1.

Mr. A.P.H. Ponda, for the Complainant.

...

CORAM : A.M.KHANWILKAR,J.

24th September 2004

ORAL JUDGMENT :

1. All these three applications are filed under sections 482 and 438 of the Code of Criminal Procedure (hereinafter, for the sake of brevity, referred to as "the Code"). The Applicants in each of these matters have been named as accused in the offence registered with Economic Offences Wing, Greater Mumbai C.B., C.I.D., Mumbai Police, vide F.I.R. No. NECR-14/2004. The said offence has been registered at the instance of Respondent No. 2 herein. Respondent No. 2 initially filed Criminal Complaint No. 145/MASC/2004 before the Additional Chief Metropolitan Magistrate, Court No. 47, at Esplanade, Mumbai, praying for directions under section 156(3) of the Code, requiring the Senior Inspector of Police, Cuffe Parade Police Station, Mumbai, to register an offence and investigate the same. In the written complaint as filed before the Magistrate, Respondent No. 2 alleged that the Applicants herein have committed offence punishable under sections 420, 409, 385 read with section 120-B and 34 of the Indian Penal Code. It is alleged in the complaint as filed that accused Nos. 2 to 4 were the shareholders and directors of accused

No.1, private limited company. The said private limited company is known by its name and style as Surya Spices Vyapar Private Limited (hereinafter referred to as "the SSVPL"). According to the Respondent No.2, complainant, the said company is a shell company having paid up capital of Rs. one lakh only consisting of 10,000 equity shares of Rs. 10/- each, which shares were held by accused Nos. 2, 3 and 4 and by Sharan P. Khanna HUF. The said SSVPL submitted offer before the Special Court in respect of Flat No. 14, First Building of the building known as NCP Apartments, Nariman Point, Mumbai admeasuring 3475 sq. ft. (hereinafter referred to as "the said flat"), which was subject matter of attachment in the proceedings before the Special Court; and the offer so made on behalf of SSVPL was accepted by the Special Court vide order dated 14th October 1998 on certain conditions. In substance, the Special Court granted agency to SSVPL to use and occupy the said flat together with the garages/open parking spaces as per the original allotment with an option to purchase the same in its own name or in the name of its nominee/nominees on the terms and conditions

stated therein. Some of the relevant terms and conditions have been referred to in para 5 of the complaint. As per the said conditions, SSVPL was required to deposit a sum of Rs.1,01,00,000/- (Rupees One crore and one lakh only) with the custodian as an interest-free deposit and was required to pay Rs. 6 lakhs as an advance rent for the lease period of five years aggregating to Rs. 6 lakhs to the custodian. As mentioned earlier, SSVPL was granted option to purchase the said flat in its own name or in the name of its nominee/nominees provided that the option was to be exercised between 4th and 5th year of the agency period from the date of order, i.e., 14th October 1998. The said order also provided that in the event SSVPL or its nominee/nominees exercising the option to purchase, the purchase price payable for the said flat was Rs.14,209/- per square feet, aggregating to Rs.4,93,75,000/- (Rupees Four crore, Ninety-three lakhs, and Seventy-five thousand only) and that they would be entitled to adjust the deposit amount of Rs.1,01,00,000/- (Rupees One crore, one lakh only) against the said purchase price. In other words, they would be required to pay only balance

amount of Rs.3,92,75,000/- (Rupees Three crores, Ninety-two lakhs, and Seventy-five thousand only) within a period of 31 days from the exercise of the option to purchase the said flat. One of the condition also provides that SSVPL or its nominee/nominees would be required to give at least three months prior notice to Divine Holding Private Limited, which company was the original owner of the said flat, in case they intended to exercise the option to purchase the said flat. It is further provided in the said order that in case SSVPL did not exercise the said option to purchase the said flat as per the specified conditions, the deposit of Rs.1,01,00,000/- (Rupees One crore, One lakh only) would stand forfeited. The complaint further alleges that in terms of the said order, SSVPL deposited the requisite amount of Rs.1,01,00,000/- (Rupees One crore, One lakh only) with the custodian and also paid advance rent of Rs. 6 lakhs to the custodian, consequent to which it was put in possession of the said flat, along with the garages/open parking spaces. It is the case of the Respondent No. 2 Complainant that some time in the year 2000, the Complainant was looking for

a flat in Mumbai, preferably in Nariman Point area; and that in and around May 2000, the accused No. 2 approached the Complainant and offered to sell the said flat to the Complainant. It is alleged that during the negotiations, accused No. 2 along with accused Nos. 3 and 4 represented to the Complainant and two other directors, namely, Mrs. Zohra Nazeer Hakeem and Mr. Nafeez Nazir Hakeem of M/s. Jem Fiscal Ltd., who also participated in the negotiations, as under :

> "a) that his company SSVPL, the company owned and fully controlled by accused Nos. 2 to 4 with Sharan P. Khanna HUF was entitled to purchase the said flat No. 14 in the NCPA apartments by the said order dated 14th October, 1998 of the Special Court, at Exhibit "B" annexed hereto.
>
> b) That the accused Nos. 2 to 4 along with Shri Sharan P. Khanna HUF owned the entire shareholding of SSVPL and SSVPL was, therefore, owned and fully controlled by the accused.
>
> c) That SSVPL could transfer the ownership of the said flat to the Complainant by transferring the entire shareholdings of SSVPL to the complainant or its company as per the said order.
>
> d) The accused No. 2 stated that the transfer of ownership of the said flat to the complainant or his company would be

> effected by selling/transferring all the shareholdings of all the accused i.e. accused Nos. 2 to 4 and of the Sharan P. Khanna HUF in SSVPL to the complainant or to his company.
>
> e) The balance amount of Rs. 3 crores 92 lakhs 75 thousand payable under the said order dated 14th October 1998, of the Honourable Special Court to purchase the said flat would be paid by the accused.
>
> f) That the SSVPL would duly exercise its option to purchase the said flat No. 14 in the NCPA Apartments in accordance with the said order dated 14th October 1998 before the expiry period of the agency granted to them by the Honourable Special Court i.e., before 13th October, 2003; but within a reasonable time after the Memorandum of Understanding between the Complainant and the accused was executed.
>
> g) In order to exercise the said option to purchase the said flat as per the said order dated 14th October, 1998, the accused would take necessary steps to inform DHPL as stated in the said order.
>
> h) After finalising the consideration to be paid by the complainant to the accused, an appropriate Memorandum of Understanding would be drawn up and executed by the parties."

It is then alleged that pursuant to the negotiations, it was finally agreed between the complainant and accused Nos. 2, 3 and 4 that the complainant would acquire the said flat by acquiring all the shares of accused Nos. 2, 3 and 4 and those of Sharan P. Khanna HUF in SSVPL

by a total consideration of Rs.5,22,50,000/- (Rupees Five crores, Twenty-two lakhs, and Fifty thousand only). It is also alleged that it was further agreed that out of the said amount of the consideration, the complainant would pay Rs. 90 lakhs directly to SSVPL as and by way of inter corporate deposit and the balance amount of Rs. 4,32,50,000/- (Rupees Four crores, Thirty-two lakhs, and Fifty thousand only) was to be paid to the four accused and Sharan P. Khanna HUF. It is further alleged that the complainant, at the time of execution of the MOU, has paid Rs.1,10,00,000 (Rupees One Crore, Ten lakhs only) to the accused as earnest money out of the said consideration. It is stated that the MOU was executed between the SSVPL, accused Nos. 2, 3 and 4 and Sharan P. Khanna HUF in SSVPL and M/s. Jem Fiscal Ltd. and Mrs. Zohra Nazeer Hakeem, one of the directors of Jem Fiscal Ltd. on 25th January 2001. It is alleged that clause 13 of the MOU provides for the obligations of the parties. Clause 13 of the said MOU reads thus :

> "The Vendors and the Company hereby jointly and severally warrant to the

purchasers who are for this purpose contracting for themselves and/or their nominees or assigns and to the intent that the provisions of this clause shall continue to have full force and effect notwithstanding the completion of the purchase of the said shares as provided in this Agreement.

a) The Company has been granted agency, as per the Order of the Special Court (Trial of Offences relating to Transactions in Securities) dated 14th October 1998, for a period of five years, to use and occupy Flat No. 14 on the 1st floor in the Apsara Building, N.C.P.A. Complex, Nariman Point, Mumbai 400 021 together with one covered car parking space No.61 in the basement and an open car parking space No. 178 in the compound of the Apsara Building (the Flat and both car parking spaces are hereinafter collectively referred to as "the said Flat"). The Company has deposited a sum of Rs.1,01,00,000/- (Rupees One crore, One lakh only) with the Custodian as interest free security deposit in respect of the said Flat and advance rent of the duration of the five years lease period aggregating to a sum of Rs.6,00,000/- (Rupees six lakhs only). The Company has an option to purchase the said Flat in its own name or in the name/s of its nominee/s at any time between 14th October 2001 to 13th October 2003 at a total purchase price of Rs.4,93,75,000/- (Rupees four crores ninety three lakhs seventy five thousand only). The amount of interest free security deposit of Rs.1,01,00,000/- (Rupees One crore one lakh only) shall be adjusted towards the purchase price and the Company and/or its nominee/s and/or assign/s shall become the owner of the said Flat on payment of the balance consideration of Rs.3,92,75,000/- (Rupees Three crores, Ninety-two lakhs, and Seventy-five thousand only).

> b) The said Flat No. 14 is lying vacant and the Company has not agreed to sell, transfer, lease, encumber, charge, give on leave & licence basis or in any manner created any third party right or interest in the said Flat No. 14 or any part or portion thereof and the Company is in use and occupation free from all encumbrances, read with Clause 13(a) above.
>
> c) The Company has not received any notice under Section 434 of the Companies Act, 1956, and there are no circumstances or occasions that may give rise to any such notice being issued.
>
> d) The Company has no subsidiaries."

It is alleged in para 10 of the complaint that because of the assurances and representations made by accused Nos. 2, 3 and 4, in particular, in clause 13(a) and (b), the complainant was led to believe that the said accused would positively exercise the option given to them in respect of the said flat and, in turn, sell the same to the complainant. It is alleged that the accused No. 1 SSVPL was a shell company of accused Nos. 2, 3 and 4 having its paid up capital of Rs. one lakh only. It is alleged that the complainant was lured by the assurances given by accused Nos. 2, 3 and 4 and in consequence thereof, decided to purchase the said flat for consideration of

Rs.4,32,50,000/- (Rupees Four crores, Thirty-two lakhs, and Fifty thousand only) as the aggregate price of 10,000 shares of SSVPL, so as to get the said flat automatically, being the property of SSVPL. It is alleged that as per the MOU, the complainant deposited Rs. 90 lakhs as inter corporate deposit and Rs.1,10,00,000 (Rupees One crore, Ten lakhs only) as earnest money. The balance consideration of Rs.3,22,52,000/- (Rupees Three crores, Twenty-two lakhs, and Fifty-two thousand only) was to be paid on or before March 7, 2001, the date and time being the essence of the agreement. In para 11 of the complaint, it is alleged that though the value of shares of SSVPL was not worth beyond Rs. 1 lakh, it was only because of the representations and promises made by accused Nos. 2 to 4 that they were going to positively exercise the option given to them under the order of the Special Court to purchase the said flat within the stipulated period, the Complainant believing the said representations and promises of the said accused entered into MOU with the accused with the understanding that with the purchase of SSVPL, he would also get possession of the said flat. In the same para,

it is further alleged that as per the MOU, the complainant had pledged one lakh shares of different companies of the then market value of Rs.6,50,00,000/- (Rupees Six crores, and Fifty lakhs only) as mentioned in the second schedule of MOU. In para 12 of the complaint, it is alleged that consequent to execution of the MOU and upon payment of Rs. 2 crores, the complainant was handed over the keys of the said flat and was put in possession by accused Nos. 2 to 4. It is alleged that because of the MOU, no other document in respect of the said flat was executed between the complainant and the accused. It is alleged in para 13 of the complaint that after the complaint was put in possession of the said flat, the complainant repeatedly reminded the accused to exercise option to purchase the said flat as per the condition specified in the Special Court order. It is alleged that till mid-December 2002, the accused did not exercise their option as promised by them. In para 14 of the complaint, it is alleged that as per the MOU dated 25th January 2001, the transaction of purchase of shares of SSVPL was to be completed by 7th March 2001, but since the accused did not

exercise the option to purchase the said flat as per the promise, the complainant did not complete the transaction as per the said MOU. It is alleged that as the complainant had earnest desire to purchase the said flat and was already put in possession of the same, and since the Respondent had carried out very extensive interior decoration, he did not want to loose the opportunity of purchasing the said flat. It is alleged that the complainant, therefore, again approached the accused to confirm whether they really intended to exercise the option and complete the transaction as per the MOU. It is alleged that the accused Nos. 2 to 4 once again assured of their intention to exercise their option provided the complainant was to pay them some more amount. As the complainant was ready to pay the balance amount of Rs.3,22,50,000/- (Rupees Three crores, Twenty-two lakhs, and Fifty thousand only), the supplementary agreement dated 13th December 2002 was executed between M/s. Jem Fiscal Ltd., Mrs. Zohra Hakeem as its director, and the accused as per the terms and conditions stated therein. As per this supplementary agreement, the price of the consideration of sale

of SSVPL was stated to be Rs.5,22,50,000/- (Rupees Five crores, Twenty-two lakhs, and Fifth thousand only) out of which the complainant had already paid Rs. 2 crores to the accused. The remaining amount of Rs.3,22,50,000/- (Rupees Three crores, Twenty-two lakhs, and Fifth thousand only) was paid by the complainant by 12 different cheques of different dates issued in different names of the respective accused and Sharan P. Khanna HUF. It is also alleged in the same para 14 that there was, however, express understanding/agreement between the complainant and the accused that the said cheques would not be deposited by the accused before exercising the option as per the MOU or without an express written consent of the complainant. In para 15 of the complaint, it is alleged that all the accused, right since inception of negotiations and execution of the MOU, had no intention to exercise the option as stated in the Special Court order and hence did not exercise the option to purchase the said flat; and thus all the accused have cheated the complainant by making false representations and promises from time to time to the complainant and making him to believe

that the accused would exercise the option to purchase the flat on payment of Rs.3,22,50,000 (Rupees Three crores, Twenty-two lakhs, and Fifty thousand only) from the complainant as per the supplementary agreement. It is further alleged that the complainant believing the accused had complied with the terms of the said agreement towards consideration, but ultimately, the accused never exercised the said option nor returned the amount of money paid to each of them by cheques as per the details provided in Exhibit E to the complaint, totally amounting to Rs.2,02,72,250/- (Rupees Two crores, Two lakhs, Seventy-two thousand, Two hundred, and fifty only), though demanded by the complainant orally from the accused for number of times and thus all the accused in furtherance of their common intention have cheated the complainant for the amount of Rs.2,02,72,250/-. It is then alleged that all the accused dishonestly induced the complainant to part with the said amount of Rs.2,02,72,250/- and thereby cheated him and have committed offence under section 420 read with section 34 of the Indian Penal Code. It is further alleged that considering all the

circumstances, it clearly shows that all the accused had conspired together to cheat the complainant and thus committed offence under section 420 read with section 120-B of the Indian Penal Code. It is then alleged that although the complainant orally demanded from the accused Nos. 2 to 4, they did not return the said amount of Rs.2,02,72,250/- to the complainant and thereby committed offence of criminal breach of trust under section 409 read with section 34 of the Indian Penal Code. In para 18 of the complaint, it is alleged that at the time of execution of the supplementary agreement dated 123th December 2002, there was an express representation and clear understanding between the complainant and all the accused that the 12 cheques amounting to Rs.3,22,50,000/- (Rupees Three crores, Twenty-two lakhs, and Fifth thousand only) will not be deposited by the accused, unless an express written consent was given by the complainant and such consent was to be given only upon the accused were to exercise the option of purchase of the said flat in the manner stated in the order of the Special Court, before lodging the cheques for encashment. It is alleged that as

the accused never exercised the option in terms of the order of the Special Court, the complainant had no reason to give consent to deposit the said cheques for encashment. It is then alleged that the accused, however, taking disadvantage of the situation that they were in custody of the duly signed cheques of the complainant intentionally presented four cheques amounting to Rs.1,54,08,750/- (Rupees One crore, Fifty-four lakhs, Eight thousand, Seven hundred, and Fifty only) for realisation some time in the third week of July 2003 in their bank. It is then alleged that as the cheques were presented by the accused without fulfilling their obligations, the complainant did not make arrangements for realisation in his account as a consequence of which the four cheques had bounced for want of sufficient funds. It is alleged that taking disadvantage, the accused have intentionally filed criminal proceedings against the complainant, his company M/s. Jem Fiscal Limited and its Directors, Zohra Hakeem and Nazeer Hakeem, under section 138 of the Negotiable Instruments Act. It is, therefore, alleged that all the accused have conspired to

put in fear of an injury to the complainant, his company and its other directors, with a view to extort the said amount of bounced cheques from the complainant, his company and its other directors, and thereby committed the offence of conspiracy of putting a person in fear of injury to commit extortion and thus have committed offence under section 385 read with section 120-B of the Indian Penal Code. On the above basis, it is alleged that offences of conspiracy to cheat and of cheating under section 420 read with section 120-B and of conspiracy of putting the complainant, his company and its other directors in fear of causing injury with a view to extort under section 385 read with section 120-B of the Indian Penal Code have been committed by the accused in the course of the said transaction. It is alleged that in pursuance of the same conspiracy and in the course of the same transaction, all the accused have committed offence of criminal breach of trust in furtherance of their common intention and committed offence under section 409 read with sections 34 and 120-B of the Indian Penal Code. On the above basis, Respondent No.2 Complainant

prayed for the following relief in the said complaint.

> "a) that Your Worship be pleased to direct under section 156(3) of the Cr.P.C. the Senior Inspector of Police, Cuffe Parade Police Station, Mumbai to register an offence and investigate the aforesaid matter.
>
> b) such other order or orders as this Honourable Court may deem fit and necessary be passed in this matter."

2. The complaint was filed in the Court of the Additional Chief Metropolitan Magistrate, on which the following order came to be passed on 13th May 2004, which reads thus :

> " Sr. P.I., Cuffe Parade P.Stn. to investigate the complaint u/s. 156(3) of Cr.P.Code. To register a case treating the complaint as the F.I.R. and investigate into the same."

On the basis of the above order, the complaint came to be registered as F.I.R. bearing No.MECR-10/2004. The accused persons and the concerned Magistrate were informed abut the compliance of the directions referred to above.

It appears that later on, the Senior Inspector of Cuffe Parade Police Station made an application to the concerned Magistrate to transfer the investigation to the Economic Offences Wing of the C.B., C.I.D., Greater Bombay, for the reasons stated in his application. The Magistrate by order dated 22nd July 2004 was pleased to allow the said application to transfer the investigation of the complaint, which was registered as F.I.R. in the Cuffe Parade Police Station, to the Economic Offences Wing of the Crime Branch, C.I.D., and has been accordingly now registered as F.I.R. bearing No. NECR-14/2004. After registration of the F.I.R., as aforesaid, the investigation into the case is stated to have commenced. The Applicants have, therefore, rushed to this Court by way of present applications for the following reliefs :

> " a) The application be admitted and the R & P pertaining to Misc. Application No. 145/M/2004 on the file and record of the Ld. Addl. C.M.M. 47th Court Esplanade be called for by this Hon'ble High Court.
>
> b) That this Hon'ble High Court may be pleased to peruse and examine the complaint filed by the Complainant M/s.

Jem Fiscal Ltd. being Misc. Application No. 145/M/04 (Exb. M) filed in the Court of the Ld. Addl. C.M.M. 47th Court Esplanade Mumbai and thereafter on being satisfied be pleased to quash and set aside the complaint.

c) That this Hon'ble High Court may be pleased to quash and set aside the order dated 13/5/04 (Exb.N) passed by the Ld. Addl. C.M.M. 47th Court Esplanade Mumbai in Misc. Application No. 145/M/04.

d) That the applicant be granted anticipatory bail by this Hon'ble High Court U/S 438 of the Cr.P.C. for the alleged offences punishable U/S 420, 409, 385, 34 r/w 120(B) registered with EOW, GB, CB, CID Mumbai Police vide FIR bearing MECR 14 of 2004 investigated presently by EOW GB B CID on such terms and conditions that this Hon'ble High Court in its discretions deems fit and proper.

e) In an event of arrest of the Applicant by the Respondent EOW, GB, CB, CID for the alleged offences punishable U/S 420, 409, 385, 34 r/w 120(B) IPC registered under FIR bearing MECR 14 of 2004 by the Police of the EOW, GB, CB, CID on a complaint of M/s. Jem Fiscal Ltd., filed in the Court of the Ld. Addl. C.M.M. 47th Court Esplanade Mumbai vide Misc. Application No. 145/M/2004 the applicant be forthwith released on bail on any terms and conditions as this Hon'ble Court may deem fit and proper.

f) That pending the hearing and final disposal of this application the respondent be restrained by an order of this Hon'ble Court from arresting the applicant and/or be directed by this Hon'ble High Court not to arrest the applicant for the alleged offences registered by the Police of the EOW, GB, CB, CID under FIR bearing MECR No. 14 of

> 2004 and of which investigation is presently being carried out by the EOW, GB, CB, CID.
>
> g) That pending the hearing and final disposal of this application this Hon'ble High Court may be pleased to stay all proceeding pertaining to Misc.Application No. 145/M/04 filed before the Court of the Ld. Addl. C.M.M. 47th Court, Esplanade, Mumbai.
>
> h) Ad-interim relief in terms of prayers (g) and (f) above.
>
> i) Any other order or orders in the interest of justice may be kindly passed by this Hon'ble High Court.
>
> j) Cost for this application be provided for."

In substance, the Applicants are praying for quashing of the First Information Report registered against them pursuant to the direction given by the Additional Chief Metropolitan Magistrate under section 156(3) of the Code and for releasing them on anticipatory bail in connection with the said offence.

3. According to the Applicants, the complainant approached them as he had interest in acquiring/purchasing 100 per cent. shares of SSVPL held by them and consequent thereto the control over the Company. Thereafter, the

Applicants entered into said MOU dated 25/1/2001. It is then stated that the Director of the Complainant Company who at the relevant time was staying in a suite on the 27th Floor of Hotel Oberoi Towers requested the Applicants to give the keys of the subject flat in order to enable him to renovate the same as the Complainant was to acquire 100 per cent. shares of SSVPL. That the Applicants trusting the Complainant and his promise, gave the keys of the subject flat to Mr. Nazir Hakeem for renovation, however, the Complainant deceitfully took possession of the said flat. That the Complainant failed to pay the amount under the MOU to complete the transaction before the stipulated date though time was the essence of the contract. It is stated that the time was extended by supplementary agreement dated 13-12-2002 upto 16-4-2003. But the Complainant failed to complete the transaction before the extended time as the cheques issued by the Complainant were dishonoured with remarks "Funds insufficient". As a consequence, the Applicants gave statutory notice and filed complaint under Section 138 of the Negotiable Instruments Act; And as the

Complainant failed to complete the transaction, by legal notice the Applicants informed the Complainant that SSVPL was unable to exercise its option to purchase the subject flat in terms of High Court order dated 14-10-1998 and are required to hand over possession thereof back to the Custodian on expiry of agency on 13-10-2003. That the Complainant directly moved the High Court for extension of time. It is stated that the Applicants called upon the Complainant to complete the purchase of 100 per cent. shares of SSVPL held by them failing which the Applicants may not exercise the option to purchase the subject flat. In substance, the stand of the Applicants is that the transaction was in relation to the shares held by the Applicants in SSVPL and not the subject flat. It is the Applicants' case that at best the case is one of breach of contract, for which lies a civil suit for damages; that the complaint is bereft of any factual foundation and not even an iota of evidence is forthcoming to support the alleged offences; the complaint/FIR does not make out any offence against the Applicants; no ingredient necessary to constitute the alleged

offence is disclosed in the complaint; and the complaint consists of false, frivolous and baseless allegations and is a gross abuse of the due process of law, filed only with mala fide intention to injure, to defame and to harm the reputation of the Applicants in the Society.

4. I have heard Mr. Ramrao Adik, Senior Advocate, and Mr. Lobo, for the Applicants, Mr. Ponda for the Respondent No.2 and Ms. Salian for the State of Maharashtra.

5. The substance of the arguments canvassed by Mr. Adik for the Applicants was that the allegations in the F.I.R. or the complaint, even if they are taken at their face value and accepted in their entirety, do not, prima facie, constitute any offence or make out a case against the accused. It was his submission that the allegations in the F.I.R. and other materials accompanying the F.I.R. do not disclose any offence justifying the investigation by the police officers. It was also contended that the allegations made in the F.I.R. or the complaint are so absurd and inherently improbable, on the

basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. It was also argued that the complaint as lodged by the Respondent No. 2 is malicious and with ulterior motive, particularly as a counterblast to the criminal action instituted against the Respondent No. 2 Complainant, which was under section 138 of the Negotiable Instruments Act, in respect of the bounced cheques. According to Mr. Adik, even after reading the complaint as a whole, it does not spell out any of the ingredients of offence of cheating, criminal breach of trust; or, for that matter, extortion. To buttress the argument that the complaint/F.I.R. does not disclose any offence, Mr. Adik placed heavy reliance on the contents of the documents accompanying the F.I.R. According to him, on proper consideration of the said documents, the complaint ought to be quashed to do substantial justice in the matter, as the allegations in the complaint are devoid of any substance. To buttress the above submissions, he placed reliance on the decision of the Apex Court in the following cases :

1) State of West Bengal v. Swapan Kumar Guha, A.I.R. 1982 S.C. 949.

2) Smt. Nagawwa v. Veeramma Shivalingappa Konjalgi and others, A.I.R. 1976 S.C. 1947.

3) Ajay Mishra v. State of M.P. and others, 2003 (4) Mh.L.J. 627.

6. Mr. Lobo for the Applicants has supplemented the arguments advanced by Mr. Adik, referred to above. He further submits that the initial order passed by the Metropolitan Magistrate under section 156(3) of the Code itself suffers from non-application of mind and since that is the basis on which the F.I.R. has been registered, the entire action is vitiated. According to him, the Magistrate was obliged to be first satisfied that the allegations in the complaint as filed disclosed any offence, much less a cognizable offence. Further contends Mr. Lobo, the Magistrate was obliged to record reasons about his satisfaction so arrived.

According to him, none of these requirements have been complied with by the Magistrate before issuing direction under section 156(3) of the Code on 13th May 2004, for which reason the said order cannot be sustained and as a consequence of which, the act of registration will have to be treated as without jurisdiction and, therefore, the proceedings ought to be quashed. Mr. Lobo further contends that there is no foundation laid in relation to the allegation of fraudulent intention of the accused from the inception or to bring home the charge of criminal breach of trust nor any supporting material is forthcoming. According to him, in fact, the accused have been cheated and deceived by the complainant. According to him, the accompanying documents to the F.I.R. need to be considered in proper perspective and if so done, the inescapable conclusion is that no offence is disclosed against the Applicants. He further submits that the Applicant in the third application is only a shareholder for which reason cannot be implicated in the commission of the alleged offences. According to him, bald statement of conspiracy has been made in the complaint and no evidence to

rope in the said Applicant is forthcoming. He submits that the said Applicant in any case ought to succeed. In addition to the authorities relied upon by Mr. Adik, referred to above, Mr. Lobo has relied on further authorities as follows.

1) Hridaya Rajan Pd. Verma v. State of Bihar, A.I.R. 2000 S.C. 2341.

2) N. Vaghul and others v. State of Maharashtra and others, 1987 Cri.L.J. 385 (Bombay).

3) Motorola Incorporated v. Union of India & others, 2004 (1) Bom.C.R. (Cri.) 26 (Bombay).

4) Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, (1998) 5 S.C.C. 749.

5) All India Institute of Medical Sciences Employees' Union (Regd.) through

its President v. Union of India and others, (1996) 11 S.C.C. 582.

6) Ashok Chaturvedi and others v. Shitul M. Chanchani and another, (1998) 7 S.C.C. 698.

8. On the other hand, Mr. Ponda, for Respondent No. 2, submits that there is no substance in the present applications. According to him, the arguments canvassed on behalf of the Applicants clearly overlook the limited scope of interference in exercise of inherent powers under section 482 of the Code for quashing of F.I.R. and interdicting the process of investigation. According to him, it is not open for this Court to embark upon an enquiry as to the reliability or genuineness of the allegations made in the F.I.R., nor it is open for this Court to enter upon the debatable area, so as to find out which version was true. He submits that it is well-settled that it is not open for the Court to appreciate the evidence, including the documents accompanying the F.I.R. or the complaint; but,

at this stage, the scope of examination is very limited as the Court will have to proceed by accepting the allegations contained in the F.I.R./complaint as genuine. He further submits that the arguments canvassed on behalf of the Applicants that the complaint is bereft of ingredients of any offence is wholly misconceived. In the first place, the complaint is quite exhaustive and clearly lays foundation regarding the ingredients of each of the offences alleged against the accused. He further submits that even if one or two ingredients of any offence is missing, that by itself cannot be a ground for quashing the F.I.R. According to him, the F.I.R. as registered fulfils the necessary conditions and it would be inappropriate for this Court to interdict the process of investigation, which is based on the said complaint. He further submits that the argument that the order passed by the Magistrate directing registration of the F.I.R. and investigation in the matter being inappropriate is also misconceived. He submits that at this stage, the Magistrate was not required to apply his mind and if he had done that, it would amount to having taken cognisance

of the complaint, in which case, the Magistrate would have been obliged to follow different procedure than to issue directions under section 156(3) of the Code. To buttress the above submissions, reliance has been placed on the decisions as follows :

1) Mushtaq Ahmad v. Mohd. Habibur Rehman Faizi and others, 1996 Cri.L.J. 1877.

2) State of M.P. v. Awadh Kishore Gupta and others, 2004 S.C.C. (Cri) 353.

3) State of Bihar and another v. P.P. Sharma and another etc. etc., 1991 Cri.L.J. 1438.

4) Rajesh Bajaj v. State NCT of Delhi and others, (1999) 3 S.C.C. 259.

5) Madhu Bala v. Suresh Kumar and others, (1997) 8 S.C.C. 476.

6) Devarapalli Lakshminarayana Reddy and

others v. V. Narayana Reddy and others, A.I.R. 1976 S.C. 1672.

9. Indeed, the Counsel appearing for both sides have produced compilation of several reported decisions besides the one already referred to above. However, I have adverted to only those decisions, which have been pressed in to service on behalf of the Counsel for the parties during the course of arguments..

10. Mrs. Pai appearing for the Respondent State has adopted the arguments canvassed on behalf of Respondent No. 2.

11. Before I proceed to examine the matter further, it is relevant to note that although the Applicants have also prayed for relief of releasing them on anticipatory bail under section 438 of the Code in the applications as filed, however, Mr. Lobo, who is on record in all the applications, on instructions, has not pressed the said relief; As the Respondents have taken preliminary objection regarding such application being moved directly before the High Court,

placing reliance on the decisions reported in (1) Chajju Ram v. State of Harayana, 1978 Cri.L.J. 608; (2) Jagannath v. State of Maharashtra, 1981 Cri.L.J. 1808; (3) Rameshchandra v. State of Gujarat, 1988 Cri.L.J. 210, (4) Padmanabh Keshav Kamat v. Anup R. Kantak, 1999 Cri.L.J. 122; and (5) Ms. Cerena D'Souza v. State of Maharashtra, 2002 Cri.L.J. 4196. According to the Respondents, the Applicants should have first approached the Sessions Court and only in exceptional circumstances, the accused can move directly to the High Court. In the light of this objection, Mr. Lobo chose not to press relief of anticipatory bail before this Court, with liberty to the Applicants to file appropriate application(s) before the Sessions Court, if so advised. He stated that the Applicants be given some protection to enable the Applicants to approach the Sessions Court for that relief.

12. Be that as it may, on considering the rival submissions, broadly, two points would arise for my consideration, namely :

1) Whether the order passed by the

Magistrate dated 13th May 2004 directing registration and investigation into the offence under section 156(3) of the Code can be sustained; and

2) Whether the first information report/complaint ought to be quashed in the facts and circumstances of the present case.

13. Insofar as the first point is concerned, in the first place, although the Applicants have prayed for setting aside order dated 13th May 2004 in the prayer clause, however, no foundation for such challenge has been laid either in the body of the applications or in the grounds set out therein. Assuming that the Applicants are entitled to canvass the said submission being purely question of law, even then I have no hesitation in observing that the same is devoid of merits. Mr. Lobo relied on the observations in the decision in Pepsi Foods case (supra) to contend that it is well-settled that issuing summons to the accused is a serious matter. According to him, issuing direction/order by the

Magistrate under section 156(3) of the Code is even more serious than issuing summons to the accused. He submits that once such direction is given by the Magistrate, it presupposes that he has implicitly expressed his opinion that cognizable offence is made out and in such a case, the police authorities will have no option but to register the case, irrespective of the fact whether the first information report discloses any cognizable offence or not. He further submits that at any rate the Magistrate should not have straightaway entertained the complaint and proceeded to issue directions under section 156(3) of the Code, unless the complainant had first approached the local police, who, in turn, had declined to entertain the complaint. Mr. Lobo further relied upon the observations of the Apex Court in the case of AIIMS (supra) to buttress the above submissions. He further submits that, in any case, the Magistrate was under an obligation to record his satisfaction that cognizable offence was made out and to pass a speaking order. In my opinion, the above arguments will have to be stated to be rejected. To my mind, there is nothing in the

Code to preclude the complainant from directly approaching the Magistrate with a written complaint. The observations in the decision in the case of AIIMS (supra), which are pressed into service are inapposite. In that case, a writ petition under "Article 226 of the Constitution" was filed before the High Court seeking direction "to conduct an investigation by the C.B.I." The Apex Court on examining the scheme of the relevant provisions rejected the said request made on behalf of the writ petitioners on the reasoning that without following the procedure provided by the Code, the writ petitioners were not entitled to approach the High Court for seeking a direction to conduct an investigation by the C.B.I., "which is not required to investigate into all or every offence". The observations in the said decision will have to be understood in the context of the fact situation of that case. However, as mentioned earlier, there is nothing in the Code which precludes the complainant to directly approach the Magistrate with a written complaint instead of going to the local police station to register the F.I.R. Both the options are independently available to the

complainant. In that sense, merely because the complainant did not first approach the local police station does not mean that the written complaint presented before the Magistrate for issuing directions under section 156(3) of the Code can be said to be without jurisdiction.

14. The next question is: what should be the approach of the Magistrate on receiving such written complaint. This aspect has been clearly answered in the two decisions of the Apex Court, which are relied upon by Mr. Ponda. In the case of Madhu Bala (supra), the Apex Court, after adverting to all the relevant provisions of the Code, proceeded to observe in para 8 as follows :

> " From a combined reading of the above provisions it is abundantly clear that when a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190(1)(a) of the Code and proceed with the same in accordance with the provisions of Chapter XV. <u>The other option available to the Magistrate in such a case is to send the complaint to the appropriate police station under Section 156(3) for investigation.</u> Once such a direction is given under sub-section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1)

> thereof and on completion of investigation to submit a "police report" in accordance with Section 173(2)) on which a Magistrate may take cognizance under Section 190(1)(b) -- but not under 190(1)(a). Since a complaint filed before a Magistrate cannot be a "police report" in view of the definition of "complaint" referred to earlier and since the investigation of a "cognizable case" by the police under Section 156(1) has to culminate in a "police report" the "complaint" -- as soon as an order under Section 156(3) is passed thereon -- transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the first information report (FIR). As under Section 156(1), the police can only investigate a cognizable "case", it has to formally register a case on that report."
>
> (emphasis supplied)

It will be apposite to advert to exposition in para 10 of the same judgment of the Apex Court, which reads thus :

> " From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a "complaint" the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to "register a case" makes an order of investigation under Section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in

> view of the provisions of Section 156(1) of the Code which empowers the police to investigate into a cognizable "case" and the Rules framed under the Indian Police Act, 1861 it (the police) is duty-bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same"."
>
> (emphasis supplied)

The other decision, which answers the argument canvassed on behalf of the Applicants is the case of Devarapalli Lakshminarayana Reddy (supra). In para 17 of the said decision, the Apex Court observed thus :

> " . . . The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Sec. 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Sec.

> 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switchback to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding." Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him." (emphasis supplied)

It will be relevant also to advert to observations in para 18 of the same decision, which reads thus :

> " In the instant case the Magistrate did

> not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding; but only for ordering an investigation under Section 156(3). He did not bring into motion the machinery of Chapter XV. He did not examine the complainant or his witnesses under Section 200, Cr.P.C., which is the first step in the procedure prescribed under that Chapter. The question of taking the next step of that procedure envisaged in Section 202 did not arise. Instead of taking cognizance of the offence, he has, in the exercise of his discretion, sent the complaint for investigation by police under S. 156."
>
> (emphasis supplied)

15. On proper understanding of the relevant provisions of the Code and the exposition in the aforesaid two decisions, it necessarily follows that on presentation of a written complaint before the Magistrate, the Magistrate is not expected to apply his mind for deciding whether or not there is sufficient ground for proceeding, in the event he is disposed of to order an investigation under section 156(3)of the Code. Whereas, in such a case, if the Magistrate was to record satisfaction that cognizable offence was made out, or, indicate any reason in that behalf, that would inevitably bring into play the regime of Chapter XV of the Code. In the present case, the Magistrate has chosen the other course and,

therefore, has not examined the complainant or his witnesses under section 200 of the Code, which is the first step in the procedure prescribed under that Chapter. On the other hand, the Magistrate chose to merely refer the complaint to the local police for registration and to investigate into the same in accordance with law, which is the legitimate direction to be issued at this stage. Viewed in this perspective, there is no substance in the grievance made about the nature of order passed by the Magistrate, and, in fact, that was the appropriate order to be passed, especially having regard to the limited relief claimed by the complainant. If it is so, the local police was justified in registering the F.I.R. Merely because the Magistrate directs registration of the complaint, that does not mean that the Magistrate has expressed opinion either way on the merits of the complaint so as to give any impression to the local police or influence the course of investigation in any manner. On the other hand, after the registration of the F.I.R., in terms of the direction of the Magistrate, the police machinery is set in motion, who, in turn,

will have to follow the procedure established by section 156 of the Code, namely, carry on the investigation impartially and then to file report before the Magistrate under section 173 of the Code. Accordingly, the first point will have to be answered against the Applicants.

16. That takes me to the second question as to whether the first information report/complaint as filed and registered ought to be quashed on the grounds canvassed before me by the Applicants. The Applicants mainly relied on the dictum of the Apex Court in the case of Swapan Kumar Guha, Ajay Mitra and Hriday Ranjan (supra) - that it is the bounden duty of the Court to quash the first information report if the same does not disclose any offence or make out a case against the accused, even if the contents of the first information report were taken at their face value and accepted in their entirety as it is. It was also argued that the allegations in the F.I.R. are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. To

buttress this argument, Counsel appearing for the Applicants drew my attention not only to the contents of the complaint, but also to the documents accompanying the F.I.R./complaint. Indeed, the observations in the decisions pressed into service on behalf of the Applicants would support the general proposition canvassed before this Court. However, what is overlooked by the Counsel is that in every decision of the Apex Court pressed into service on behalf of the Applicants, or, for that matter, by the Respondent No. 2, a word of caution has been indicated. In the case of Swapan Kumar Guha, the Apex Court has referred to its earlier decisions in paras 16 to 21. In para 16, reference is made to the observations in R. P. Kapur v. State of Punjab, A.I.R. 1960 S.C. 866, at pp. 868, 69. It was observed in that decision that though ordinarily criminal proceedings instituted against an accused must be tried under the provisions of the Code, there are some categories of cases where the inherent jurisdiction of the Court can and should be exercised for quashing the proceedings. It is further observed that one such category, according to the Court, consists

of cases where the allegations in the F.I.R. or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises and it is a matter merely of looking at the F.I.R. or the complaint in order to decide whether the offence alleged is disclosed or not. In paras 64 and 65 of the same reported decision, following observations are made :

> " In my opinion, the legal position is well settled. The legal position appears to be that if an offence is disclosed, the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted. The observations of the Judicial Committee and the observations of this Court in the various decisions which I have earlier quoted, make this position abundantly clear. The propositions enunciated by the Judicial Committee and this Court in the various decisions which I have earlier noted, are based on sound principles of justice. Once an offence is disclosed, an investigation into the offence must necessarily follow in the interests of justice. If, however, no offence is disclosed, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to

a party, whose liberty and property may be put to jeopardy for nothing. The liberty and property of any individual are sacred and sacrosanct and the Court zealously guards them and protects them. An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interest of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation, in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the Court normally does not interfere with the investigation of a case where an offence has been disclosed. . . ."

" Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. In considering whether an offence into which an investigation is made or to be made, is disclosed or not, the Court has mainly to take into consideration the complaint or the F.I.R. and the Court may in appropriate cases take into consideration the relevant facts and circumstances of the case. On a consideration of all the relevant materials, the Court has to come to the conclusion whether an offence is disclosed or not. If on a consideration of the relevant materials, the Court is

> satisfied that an offence is disclosed, the Court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence. If, on the other hand, the Court on a consideration of the relevant materials is satisfied that no offence is disclosed, it will be the duty of the Court to interfere with any investigation and to stop the same to prevent any kind of uncalled for and unnecessary harassment to an individual."
>
> (emphasis supplied)

Relying on the observations in para 65, it was vehemently argued on behalf of the Applicants that it is open to the Court to consider the relevant materials at least the ones accompanying the complaint before recording satisfaction that an offence is disclosed. To my mind, however, other materials, accompanying the F.I.R., are to be considered not as a general rule, but as an exception. For, the Apex Court in the above referred decision in para 65 has observed that the Court "may in appropriate cases" take into consideration the "relevant facts and circumstances of the case". In any case, consideration of the other materials does not mean appreciation or analysis of the said

materials, in the context of the stand of the Applicants/Accused, as is the attempt made on behalf of the Applicants.

17. Even in the case of Ajay Mishra (supra), the observations of the Apex Court will have to be understood in the same manner. Indeed, in that case, the Apex Court has quashed the first information report, but that was done on the finding as is recorded in para 18 that the appellants before it were not at all in the picture at the time when the complainant claims to have spent money in improvement of its bottling plant on the basis of the agreement executed with Cadbury Schweppes Beverages India Pvt. Ltd. As the appellants before the Apex Court were not at all involved at the relevant time, there cannot be any guilty intention attributed to them; and on that basis, the Apex Court proceeded to observe that no offence of cheating was disclosed qua them.

18. Even in the third decision in the case of Hridaya Ranjan Pd. Verma (supra), the Court has recorded a clear finding in para 17 that reading

the averments in the complaint in its entirety and accepting the allegations to be true, the ingredients of intentional deception on the part of the accused right at the beginning of the negotiations for the transaction has neither been expressly stated nor indirectly suggested in the complaint. In the present case, it is not open to take that view; for there is clear assertion in the complaint in this behalf. I shall elaborate on this aspect a little later. Indeed, in this decision, the Court has adverted to the ingredients of offence of cheating and then on the aforesaid finding thought it appropriate to quash the pending first information report.

18. Before I proceed to examine the matter further, it will be appropriate to advert to the exposition of the Apex Court in the recent decisions, which, in turn, have followed the consistent view on the issue of quashing of F.I.R. Reliance has been rightly placed on the decision of Mushtaq Ahmad (supra). In that case, the appellants had filed complaint alleging commission of offence under sections 406, 409, 420 and 467 of the Indian Penal Code against

respondents Nos.1 to 4 therein. The Magistrate took cognizance of the complaint and then recorded statement of the appellant under section 200 of the Code and on being satisfied, proceeded to issue process against the accused. The accused, in turn, filed petition under section 482 of the Code for quashing the complaint and proceedings arising therefrom which was allowed by the High Court with a finding that the complaint was false, frivolous and vexatious. The Apex Court while dealing with the said aspect has adverted to the word of caution expressed in the case of State of Haryana v. Bhajan Lal, 1992 Supp (1) S.C.C. 335. In para 109 of the decision in Bhajan Lal's case, the Apex Court has enumerated, by way of illustration, the categories of cases in which power to quash the complaint or F.I.R. can be exercised by keeping in mind and adhering to note of caution, which observation reads thus :

> " We also give a note of caution to the effect that the power of quashing should be exercised very sparingly and in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or

> genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice."
>
> (emphasis supplied)

In Mushtaq Ahmad's case (supra), the Apex Court, applying the said principle, observed that inspite of such established position, the High Court erroneously proceeded to consider the version of the respondents contained in their petition filed under section 482 of the Code vis a vis that of the appellant and entered into the debatable area of deciding which of the version was true. In the present case, the Counsel appearing for the Applicants have advanced argument calling upon this Court to appreciate the documents, which are accompanying the first information report/complaint and to accept their version that the said transaction was pure and simple in respect of shares and had no causal connection with the said flat. On the other hand, applying the legal principle stated in the abovesaid reported decision, it is not open for me to embark upon an enquiry as to the reliability or genuineness or otherwise of the

allegations made in the first information report or the complaint as filed. The allegations in the complaint and the case as stated by the complainant for the time being will have to be taken as it is.

20. Reliance has been rightly placed on the recent decision in the case of State of M.P. v. Awadh Kishore Gupta and others (supra). In this judgment, the Apex Court, while dealing with the issue in hand, has adverted to its earlier decisions and articulated the legal position in paras 8 to 13, as under :

> "8. Exercise of power under Section 482 of the Code in a case of this nature is an exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers

apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle quando lex aliquid alicuiconcedit, concedere videtur id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist.) <u>While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself</u>. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the

complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

9. In R.P.Kapur v. State of Punjab, A.I.R. 1960 S.C. 866, this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings :

> (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
>
> (ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process, no doubt, should not be an instrument of oppression or needless harassment. Court should be circumspect and judicious in exercising discretion

and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal, 1992 Supp (1) S.C.C. 335. A note of caution was, however, added that the power should be exercised sparingly and that too in the rarest of the rare cases. The illustrative categories indicated by this Court are as follows : (SCC pp.378-79, para 102)

> '(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or

> complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.'

11. As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very

plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage. ((See Janata Dal v. H.S. Chowdhary, (1992) 4 S.C.C. 305 and Raghubir Saran (Dr) v. State of Bihar, A.I.R. 1964 SC 1)). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceedings instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction

or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court which decide the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by itself be the basis for quashing the proceedings. (See Dhanalakshmi v. R. Prasanna Kumar, 1990 Supp SCC 686, State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222, Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 SCC 194, State of Kerala v. O.C. Kuttan, (1999) 2 SCC 651, State of U.P. v. O.P. Sharma, (1996) 7 SCC 705, Rashmi Kumar v. Mahesh Kumar Bhada, (1997) 2 SCC 397, Satvinder Kaur v. State (Govt. of NCT of Delhi), (1999) 8 SCC 728, and Rajesh Bajaj v. State NCT of Delhi, (1999) 3 SCC 259.

12. These aspects were also highlighted in State of Karnataka v. M. Devendrappa, (2002) 3 SCC 89.

13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the Court to act as if it was a trial Judge. Even when charge is framed at that stage, the

> Court has to only prima facie be satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate material and documents on records but it cannot appreciate evidence. The Court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."
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> (emphasis supplied)

Applying the above principles it is not open for this Court to appreciate the documents accompanying the first information report in the context of the case made out by the Applicants for quashing of the first information report or to analyse the case of the complainant in the light of all probabilities to ascertain whether the accusation can be sustained, which in the present case, the investigation is still in progress and at this stage, it is impermissible for this Court to meticulously analyse the materials, the acceptability of which is essentially a matter of trial.

21. Reliance has also been rightly placed on the decision of State of Bihar v. P.P. Sharma (supra) where the Apex Court has observed that

appreciation of evidence is the function of the criminal courts and that role cannot be usurped by the High Court in exercise of inherent jurisdiction so as to quash the F.I.R.

22. In the case of Rajesh Bajaj (supra), the Apex Court has had an occasion to consider the legal position as is stated in paras 9 to 12 of the report, which read thus :

> "9. It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. . . .
>
> 10. It may be that the facts narrated in the present complaint would as well

reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code (Illustration f) is worthy of notice now :

> '(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.'

11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities.

12. The High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a cullender of finest gauzes for testing the ingredients under Section 415 IPC. Such an endeavour may be justified during trial, but certainly not during the stage of investigation. At any rate, it is too premature a stage for the High Court to step in and stall the investigation by declaring that it is a commercial

> transaction simpliciter wherein no semblance of criminal offence is involved."
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> (emphasis supplied)

Although the Applicants have relied on the dictum in the cases of Nagawwa; Pepsi Foods Ltd.; N. Vaghul; and Motorola Incorporated (supra), however, the legal position as referred to above is reiterated in all these decisions while considering the quashing of private complaint and process issued by the Magistrate.

23. Be that as it may, keeping in mind the above established principles, I have no hesitation in observing that the arguments canvassed on behalf of the Applicants are devoid of merits. The grievances made on behalf of the Applicants will have to be stated to be rejected. I have already adverted to all the relevant allegations contained in the written complaint, which is now registered as FIR. To my mind, necessary foundation has been laid alleging that the accused made certain false representations and induced the complainant by those representations to part with the substantial amount on the assurance that they were positively

going to exercise the option to purchase the said flat in terms of the order of the Special Court; whereas the Applicants never acted upon the said promise and had no intention to do so right from the inception as can be gathered from the various circumstances. There is clear allegation in the complaint that accused Nos. 2 to 4 made false representations and assured the complainant and made the complainant believe that they would positively exercise the option to purchase the said flat and were going to do the business of that property by selling the same to the complainant. It is alleged in the complaint that SSVPL was a shell and non-listed company of accused Nos. 2 to 4 having paid up capital of Rs. 1 lakh only and the complainant was lured by the assurances given by accused Nos. 2 to 4 and in consequence whereof, the complainant decided to purchase and offered price of Rs.4,32,00,000/- (Rupees Four crores, Thirty-two lakhs only) as aggregate price of shares of SSVPL as consideration for purchase of SSVPL on the understanding that he would automatically get the said flat being property of SSVPL. The complainant was lured and was made to part with

substantial amounts because of the representations and promises made by accused Nos. 2 to 4 and the complainant believing the said representations and promises entered into MOU with the said accused. After referring to all the circumstances, the complaint alleges that all the accused right since inception of negotiations and execution of MOU had no intention to exercise the option and hence did not exercise the option to purchase the said flat whereby they cheated the complaint by making false representations and promises from time to time and making the complainant to believe to the contrary, so as to part with substantial amounts. There is clear allegation of accused dishonestly inducing the complainant to part with the substantial amount of Rs.2,02,72,250/- (Rupees Two crores, Two lakhs, Seventy-two thousand, Two hundred, and Fifty only). There is also clear allegation that inspite of demand made by the complainant for return of the said amounts, the accused have not acceded to that request and thus misappropriated the said amount of complainant, thereby committing criminal breach of trust. However, Counsel for the Applicants made fervent effort to

persuade me that even upon reading the complaint as a whole, it does not make out the necessary ingredients to constitute cognizable offences, such as cheating, criminal breach of trust. However, it is not possible to accept this submission. Moreover, as is observed by the Apex Court that even when one or two ingredients of the offence are not stated in detail, the Court will not hasten to quash criminal proceedings during investigation stage on that count alone. Besides, in the light of the decisions of the Apex Court referred to above it is also not permissible for this Court to appreciate the materials in the context of the case made out by the Applicants. Nor this Court can sieve through the complaint through the finest gauzes for testing the ingredients of the alleged offence, which approach is legitimate during the trial - but in no case at the stage of investigation; And it is too premature for this Court to step in and stall the investigation by declaring that it is a commercial transaction simpliciter. That cannot be the scope of enquiry while exercising inherent jurisdiction.

24. On the other hand, to my mind, the complaint/FIR, if read as a whole, it is seen that factual foundation for the offence has been laid in the complaint and the relevant allegations clearly disclose the case against each of the Applicants. There is clear allegation regarding involvement of all the accused right from the inception and having conspired to cheat the complainant and also commit criminal breach of trust. There is clear allegation that the accused were appointed as agents and as agents they have committed criminal breach of trust of the moneys received and entrusted for the said flat, which are misappropriated by them, which is done dishonestly. It is also alleged that the accused have deposited cheques for encashment worth Rs.3,22,50,000/- (Rupees Three crores, Twenty-two lakhs, and Fifth thousand only) without fulfilling their obligations and without the express consent given by the complainant.

25. Taking overall view of the matter, this is not a fit case for exercising inherent jurisdiction under section 482 of the Code, so as

to interdict the process of investigation, which is set in motion after registration of the offence, which is a cognizable offence. The allegations in the complaint, if accepted at their face value and in their entirety, prima facie, constitute offence alleged against each of the accused Nos. 2 to 4. It is not possible to even remotely suggest at this stage that the allegations made in the FIR/complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. On the other hand, the allegations in the complaint will have to be accepted as they are, as is required to be understood at this stage.

26. Viewed in this perspective, no case for exercising inherent jurisdiction is made out. Hence, all the three applications should fail.

27. As mentioned earlier, as the Applicants have not pressed the relief of releasing them on anticipatory bail before this Court, with liberty to approach the Sessions Court for the same

relief, no orders are passed in relation to the said relief. It will be open to the Applicants to approach the Sessions Court within two weeks from today. Till such time, the interim protection granted by this Court to the Applicants will continue. If the Applicants prefer application for anticipatory bail under section 438, Cr.P.C., before the Sessions Court, the same be decided on its own merits in accordance with law.

28. Accordingly, all the three Criminal Applications are dismissed on the above terms.

(A.M.KHANWILKAR,J.)